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No. 14-1375

IN THE

Supreme Court of the United States

CRST VAN EXPEDITED, INC.,

Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

[redacted] **BRIEF *AMICI CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL AND NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER IN SUPPORT OF PETITIONER**

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June 2015

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL AND NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER IN SUPPORT OF PETITIONER

To the Honorable the Chief Justice and the Associate Justices of the United States Supreme Court:

Pursuant to Rule 37.1 and 37.2 of the Rules of this Court, the Equal Employment Advisory Council (EEAC) and National Federation of Independent Business Small Business Legal Center (NFIB) hereby respectfully move this Court for leave to file the

accompanying brief as *amici curiae* in support of the position of the Petitioner in this case. The written consent of the attorney for the Petitioner has been filed with the Clerk of the Court. The consent of the attorney for the Respondent was requested but not acted upon.

In support of its motion, EEAC and NFIB submit the following:

1. The Equal Employment Advisory Council (EEAC) is a nationwide association of employers organized in 1976 to promote sound approaches to the elimination of discriminatory employment practices. Its membership includes over 250 major U.S. corporations, collectively providing employment to millions of workers. EEAC's directors and officers include many of the nation's leading experts in the field of equal employment opportunity. Their combined experience gives EEAC a unique depth of understanding of the practical, as well as legal, considerations relevant to the proper interpretation and application of equal employment policies and requirements. EEAC's members are firmly committed to the principles of nondiscrimination and equal employment opportunity.

2. The National Federation of Independent Business (NFIB) Small Business Legal Center is a nonprofit, public interest law firm established to provide legal resources and be the voice for small businesses in the nation's courts through representation on issues of public interest affecting small businesses. NFIB is the nation's leading small business association, with offices in Washington, D.C. and all 50 state capitals. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the right of its members to own,

operate, and grow their businesses. NFIB represents 350,000 member businesses nationwide. The NFIB Small Business Legal Center represents the interests of small business in the nation's courts and participates in precedent setting cases that will have a critical impact on small businesses nationwide, such as the case before the Court in this action.

3. Many of *amici*'s members are employers, or representatives of employers, subject to Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. §§ 2000e *et seq.*, as amended, and other federal employment-related laws and regulations. As representatives of potential defendants to Title VII discrimination charges and lawsuits, *amici*'s members have a substantial interest in the issue presented in this case regarding whether attorney's fees are available to a prevailing defendant when a Title VII claim is dismissed based on the U.S. Equal Employment Opportunity Commission's (EEOC) failure to meet its statutory investigation requirements prior to initiating litigation.

4. As national representatives of many professionals whose primary responsibility is compliance with equal employment opportunity laws and regulations, *amici* have perspectives and experience that can help the Court assess issues of law and public policy raised in this case beyond the immediate concerns of the parties. Since 1976, EEAC and NFIB collectively have participated as *amicus curiae* in hundreds of cases before this Court and the federal courts of appeals, many of which have involved important questions of Title VII's proper interpretation and application. Because of their practical experience in these matters, *amici* are well-situated to brief the Court on the

relevant concerns of the business community and the significance of this case to employers generally.

WHEREFORE, for the reasons stated, the Equal Employment Advisory Council and National Federation of Independent Business Small Business Legal Center respectfully request the Court grant them leave to file the accompanying brief *amici curiae*.

Respectfully submitted,

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BRIEF *AMICI CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL AND NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER IN SUPPORT OF PETITIONER

The Equal Employment Advisory Council and National Federation of Independent Business Small Business Legal Center respectfully submit this brief *amici curiae* in support of the petition for a writ of certiorari.[1]

[1] Counsel of record for all parties received notice at least 10 days prior to the due date of the *amici curiae's* intention to file this brief. Counsel for *amici curiae* authored this brief in its entirety. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No

INTEREST OF THE *AMICI CURIAE*

The Equal Employment Advisory Council (EEAC) is a nationwide association of employers organized in 1976 to promote sound approaches to the elimination of discriminatory employment practices. Its membership includes over 250 major U.S. corporations, collectively providing employment to millions of workers. EEAC's directors and officers include many of the nation's leading experts in the field of equal employment opportunity. Their combined experience gives EEAC a unique depth of understanding of the practical, as well as legal, considerations relevant to the proper interpretation and application of equal employment policies and requirements. EEAC's members are firmly committed to the principles of nondiscrimination and equal employment opportunity.

The National Federation of Independent Business (NFIB) Small Business Legal Center is a nonprofit, public interest law firm established to provide legal resources and be the voice for small businesses in the nation's courts through representation on issues of public interest affecting small businesses. NFIB is the nation's leading small business association, with offices in Washington, D.C. and all 50 state capitals. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the right of its members to own, operate, and grow their businesses. NFIB represents 325,000 member businesses nationwide. The NFIB Small Business Legal Center represents the interests of small business in the nation's courts and participates in precedent setting cases that will have a critical impact on small businesses nationwide, such as the case before the Court in this action.

Many of *amici*'s members are employers, or representatives of employers, subject to Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. §§ 2000e *et seq.*, as amended, and other federal employment laws and regulations. As representatives of potential defendants to Title VII discrimination charges and lawsuits, *amici*'s members have a substantial interest in the issue presented in this matter regarding the propriety of awarding attorney's fees to a prevailing defendant where the EEOC's failure to investigate or attempt conciliation results in dismissal of a subsequent Title VII lawsuit. The court below ruled, erroneously, that an award of attorney's fees and costs is unavailable in the absence of a judicial determination on the merits of the underlying claim, and that dismissal for failure to investigate or conciliate does not constitute a merits decision.

As national representatives of many professionals whose primary responsibility is compliance with equal employment opportunity laws and regulations, *amici* have perspectives and experience that can help the Court assess issues of law and public policy raised in this case beyond the immediate concerns of the parties. Since 1976, EEAC and NFIB collectively have participated as *amicus curiae* in hundreds of cases before this Court and the federal courts of appeals, many of which have involved important Title VII questions. Because of their practical experience in these matters, *amici* are well-situated to brief the Court on the relevant concerns of the business community and the significance of this case to employers generally.

STATEMENT OF THE CASE

On September 27, 2007, the EEOC commenced a civil action against CRST Van Expedited, Inc. (CRST), accusing the company of engaging in unlawful sex discrimination against a class of unidentified female drivers, in violation of Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. §§ 2000e *et seq.*, as amended. Pet. App. 34a. During discovery, the EEOC ultimately identified 270 women who allegedly had experienced sexual harassment. Pet. App. 38a.

At the close of discovery, the district court dismissed 99 of the individual claims as a discovery sanction. Pet. App. 40a. The EEOC did not appeal that determination. *Id.* Subsequently, the district court granted summary judgment to CRST on more than half of the remaining claims on a variety of bases. Finally, the district court granted CRST's motion to dismiss the last 67 individual claims because the agency had failed to comply with its statutory obligation under Title VII to investigate, issue a reasonable cause determination, and conciliate the claims. Pet. App. 204a, 213a.

Thereafter, CRST moved for an award of attorney's fees on the ground that the EEOC's actions in bringing the case were unreasonable and vexatious. *EEOC v. CRST Van Expedited, Inc.*, No. 07-CV-95-LRR, 2010 WL 520564, at *7, *vacated by* 760 F.3d 847 (8th Cir. 2012). Applying the standard for awarding attorney's fees to prevailing defendants in Title VII cases established by this Court in *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412 (1978), the district court determined that an award of fees was warranted because "[t]he EEOC's failure to investigate and attempt to conciliate the individual claims constituted

an unreasonable failure to satisfy Title VII's prerequisites to suit." *Id.* Accordingly, the lower court ordered the EEOC to reimburse approximately $4.5 million of the attorney's fees and other costs incurred by CRST. *Id.* at *20.

On appeal, the Eighth Circuit affirmed the dismissal of the 67 individual claims, determining that the "record confirms that the EEOC wholly failed to satisfy its statutory pre-suit obligations as to these 67 women...." Pet. App. 115a-116a. The court also affirmed on the vast majority of claims on which summary judgment had been granted. Pet. App. 116a-156a. Because two claims were remanded to the district court, the Eighth Circuit vacated the award of attorney's fees and costs to CRST without prejudice. Pet. App. 156a.

After entry of final judgment on remand, the district court awarded CRST a total of $4,189,296.10 in attorney's fees, $413,387.58 in out-of-pocket expenses, and $91,758.46 in taxable costs. Pet. App. 84a-85a. The EEOC appealed, arguing that it was the prevailing party because it only brought one claim, which it settled out-of-court with CRST. Pet. App. 17a.

On appeal, the Eighth Circuit rejected the EEOC's argument that it was the prevailing party, Pet. App. 17a, but found that because the EEOC never formally asserted that CRST was engaged in a pattern-or-practice of sex discrimination, the trial court erred to the extent it awarded attorney's fees on that basis. Pet. App. 18a.

The Eighth Circuit also reversed the attorney's fee award as to the 67 individual claims that were dismissed because of the EEOC's failure to satisfy its pre-suit requirements. Pet. App. 23a-24a. Finally, it

vacated the lower court's fee award with respect to the individual claims dismissed on summary judgment, and remanded the fee issue for a determination by the district court whether each individual claim was unreasonable under *Christiansburg*. Pet. App. 28a.

SUMMARY OF REASONS FOR GRANTING THE WRIT

Review of the decision below is warranted to settle a conflict in the courts on an issue that is of substantial importance to the employer community regarding the circumstances under which a prevailing defendant is entitled to attorney's fees under Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. §§ 2000e *et seq.*, as amended. Specifically, lower courts disagree as to the propriety of an attorney's fee award for the U.S. Equal Employment Opportunity Commission's (EEOC) unreasonable litigation conduct stemming from the agency's failure to satisfy its pre-suit administrative investigation requirements in advance of bringing a lawsuit. In ruling that a prevailing defendant may not be awarded fees on that basis, the Eighth Circuit departs from decisions of the Fourth and Ninth Circuits.

The EEOC was created by Congress to enforce Title VII, which prohibits discrimination in the terms, conditions, and privileges of employment on the basis of race, color, religion, sex, or national origin. 42 U.S.C. § 2000e-2(a)(1). Title VII establishes "'an integrated, multistep enforcement procedure' that ... begins with the filing of a charge with the EEOC alleging that a given employer has engaged in an unlawful employment practice." *EEOC v. Shell Oil Co.*, 466 U.S. 54, 62 (1984) (quoting *Occidental Life Ins. Co. v. EEOC*, 432 U.S. 355, 359 (1977) (footnote omitted)).

The EEOC is authorized to bring a lawsuit against an employer in federal court, but only after it has discharged its statutory pre-suit administrative requirements, including completing an investigation of the charge. 42 U.S.C. § 2000e-5(b). In addition, the permissible scope of a lawsuit brought by the EEOC is limited to seeking relief on behalf of the "individuals and wrongdoing [discovered] *during the course of its investigation.*" Pet. App. 109a (citations omitted).

Title VII contains a fee-shifting provision that allows a court to award reasonable attorney's fees and costs to the prevailing party, expressly providing that the EEOC "shall be liable for costs the same as a private person." 42 U.S.C. § 2000e-5(k). As this Court recognized, one of the purposes of the fee-shifting provision is to "'deter the bringing of lawsuits without foundation'...." *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 420 (1978) (citation omitted). To that end, the Court in *Christiansburg* held that a prevailing defendant may be assessed attorney's fees and costs when a court determines that a claim "was frivolous, unreasonable, or groundless, or that the plaintiff continued to litigate after it clearly became so." 434 U.S. at 422.

Despite the importance of Title VII's administrative scheme, the EEOC repeatedly has circumvented the process in recent years by failing to investigate the claims of all those on whose behalf it seeks relief, and by persistently refusing to engage in meaningful efforts to resolve such claims informally, without resort to protracted litigation. The Fourth and Ninth Circuits are of the view that, under *Christiansburg*, a prevailing defendant is entitled to an award of attorney's fees for costs directly related to the EEOC's

failure to discharge its mandatory pre-suit administrative duties.

The decision below is in direct conflict. Specifically, even though the EEOC "wholly failed to satisfy its statutory pre-suit obligations" as to at least 67 individual claims, Pet. App. 115a-116a, the Eighth Circuit disagreed that the EEOC's malfeasance did not support an attorney's fee award, because the EEOC's "failure to satisfy Title VII's pre-suit obligations does not constitute a ruling on the merits." Pet. App. 23a-24a.

The EEOC has embarked recently on an aggressive litigation strategy. In its zeal to litigate large, high profile class-based suits, the agency's enforcement priorities seemingly have moved away from informal resolution of discrimination charges, as contemplated by Title VII, and towards broad, systemic litigation. The EEOC's failure to comply in every instance with its statutory duty to investigate and conciliate prior to suit is particularly problematic where, as here, a single individual charge is transformed by the EEOC into a complex, time-consuming, and expensive lawsuit brought on behalf of approximately 270 individuals. Pet. App. 38a. This recurring pattern by the EEOC of resorting to litigation prior to first satisfying its pre-suit responsibilities provides compelling support for utilizing the sanction of attorney's fees as a deterrent against inexcusable dereliction of the agency's compliance with Title VII.

REASONS FOR GRANTING THE WRIT

WHETHER AND TO WHAT EXTENT A PREVAILING DEFENDANT IS ENTITLED UNDER TITLE VII TO AN ATTORNEY'S FEE AWARD AS A RESULT OF THE EEOC'S UNREASONABLE LITIGATION CONDUCT IS A RECURRING ISSUE THAT IS OF SUBSTANTIAL IMPORTANCE TO THE EMPLOYER COMMUNITY

This case presents a matter of national importance to the more than half a million American employers, large and small, that are subject to enforcement of Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. §§ 2000e *et seq.*, as amended, by the U.S. Equal Employment Opportunity Commission (EEOC). Although Title VII mandates that the EEOC must satisfy a number of interrelated, pre-suit administrative requirements prior to commencing suit in federal court, the lower courts are in disagreement regarding whether an employer may recoup attorney's fees and costs expended in defending an EEOC suit that was not first subject to a proper investigation and ultimately was found to have been frivolous, unreasonable, or groundless on that basis. Because of the significance of this question to all employers subject to Title VII, review by this Court is warranted.

A. The Eighth Circuit's Holding Is In Direct Conflict With Decisions By The Fourth And Ninth Circuits Permitting Prevailing Defendants To Recover Attorney's Fees For Claims Dismissed Because Of The EEOC's Failure To Satisfy Its Mandatory Title VII Pre-Suit Administrative Investigation Procedures

Title VII prohibits discrimination in the terms, conditions, or privileges of employment on the basis of race, color, religion, sex, or national origin. 42 U.S.C. § 2000e-2(a)(1). The statute contains a fee-shifting provision that permits a court to award a prevailing party reasonable attorney's fees:

> In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee (including expert fees) as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person.

42 U.S.C. § 2000e-5(k).

In *Christiansburg Garment Co. v. EEOC*, this Court enunciated the standard for assessing attorney's fees and costs in favor of a prevailing defendant in a Title VII case. 434 U.S. 412 (1978). The Court held that a prevailing defendant is entitled to an award of attorney's fees and costs when a court finds that the claim "was frivolous, unreasonable, or groundless, or that the plaintiff continued to litigate after it clearly became so." *Id.* at 422. The Court reasoned that a heightened burden is necessary so as not to "undercut the efforts of Congress to promote the vigorous enforcement of the provisions of Title VII." *Id.*

At the same time, the Court observed that "while Congress wanted to clear the way for suits to be brought under the Act, it also wanted to protect defendants from burdensome litigation having no legal or factual basis." *Id.* at 420. The Court also noted that Title VII's attorney's fee provision "explicitly provides that 'the Commission and the United States shall be liable for costs the same as a private person.'" *Id.* at 423 n.20 (citation omitted). Thus, the Court found "no grounds for applying a different general standard whenever the Commission is the losing plaintiff." *Id.*

In addition, a court may order attorney's fees in favor of a prevailing defendant "even if a plaintiff's suit is not wholly frivolous." *Fox v. Vice*, 131 S. Ct. 2205, 2214 (2011).[2] "Fee shifting to recompense a defendant (as to recompense a plaintiff) is not all-or-nothing: A defendant need not show that every claim in a complaint is frivolous to qualify for fees." *Id.* The fee provision thus "serves to relieve a defendant of expenses attributable to frivolous charges. The plaintiff acted wrongly in leveling such allegations, and the court may shift to him the reasonable costs that those claims imposed on his adversary." *Id.* (citation omitted).

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[2] In *Fox*, the Court construed the attorney's fee provision set forth in 42 U.S.C. § 1988. This Court has noted that the fee-shifting provisions in 42 U.S.C. § 2000e-5(k) and 42 U.S.C. § 1988 "are to be interpreted alike." *Independent Federation of Flight Attendants v. Zipes*, 491 U.S. 754, 758 n.2 (1989) (citation omitted); *see also Hanrahan v. Hampton*, 446 U.S. 754, 758 n.4 (1980) (noting that § 1988 was patterned after § 2000e-5(k)).

1. The EEOC has a duty to investigate and properly conciliate Title VII discrimination charges prior to filing suit

Title VII "sets out a detailed, multi-step procedure through which the Commission enforces the statute's prohibition on employment discrimination." *Mach Mining, LLC v. EEOC*, 135 S. Ct. 1645, 1649 (2015); *see also EEOC v. Shell Oil Co.*, 466 U.S. 54, 62 (1984). That multi-step administrative procedure begins with the filing, service, and investigation of a discrimination charge, and concludes with mandatory, pre-suit conciliation. 42 U.S.C. § 2000e-5(b).

When first enacted, Title VII only permitted the EEOC to prevent and correct discrimination through discrimination charge investigations and, where appropriate, "conference, conciliation, and persuasion." 42 U.S.C. § 2000e-5(b). In 1972, however, Congress amended Title VII to authorize the EEOC to sue private employers in its own name, both on behalf of alleged victims and in the public interest. Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103 (1972).

At the same time, Congress retained Title VII's administrative enforcement scheme as a prerequisite to suit. 42 U.S.C. § 2000e-5(f). As this Court has observed:

> When Congress first enacted Title VII in 1964 it selected "(c)ooperation and voluntary compliance . . . as the preferred means for achieving" the goal of equality of employment opportunities. ... Although the 1972 amendments provided the EEOC with the additional enforcement power of instituting civil actions in federal courts, Congress preserved the EEOC's administrative

> functions in s 706 of the amended Act. Thus, under the procedural structure created by the 1972 amendments, the EEOC does not function simply as a vehicle for conducting litigation on behalf of private parties; *it is a federal administrative agency charged with the responsibility of investigating claims of employment discrimination and settling disputes, if possible, in an informal, noncoercive fashion. Unlike the typical litigant ... the EEOC is required by law to refrain from commencing a civil action until it has discharged its administrative duties.*

Occidental Life Ins. Co. v. EEOC, 432 U.S. 355, 367-68 (1977) (emphasis added) (citation omitted).

The EEOC's procedural regulations also reflect this Congressional mandate, providing that "[t]he investigation of a charge *shall* be made by the Commission ...." 29 C.F.R. § 1601.15(a) (emphasis added). Should the EEOC find reason to believe discrimination occurred, the agency may issue a determination *only* "based on, and limited to, evidence obtained by the Commission" during the investigation. 29 C.F.R. § 1601.21(a). "Where the Commission determines that there is reasonable cause to believe that an unlawful employment practice has occurred or is occurring, the Commission *shall* endeavor to eliminate such practice by informal methods of conference, conciliation and persuasion." 29 C.F.R. § 1601.24(a) (emphasis added). Only when the EEOC is "unable to obtain voluntary compliance," 29 C.F.R. § 1601.25, through "informal methods of conference, conciliation and persuasion" may it initiate a public enforcement action. 29 C.F.R. § 1601.24(a). Accordingly, unlike private litigants, the EEOC has a special obligation to carefully evaluate

the merits of every case *before* undertaking costly and resource-intensive litigation.

2. Applying the standard enunciated by this Court in *Christiansburg*, the Fourth and Ninth Circuits permit recovery of attorney's fees when an unsuccessful EEOC lawsuit followed a failure to discharge pre-suit procedures

The EEOC generally is permitted to pursue in litigation any statutory violation growing out of facts uncovered during a "reasonable investigation" of an underlying charge. *See EEOC v. Delight Wholesale Co.*, 973 F.2d 664, 668-69 (8th Cir. 1992). This "reasonable investigation" rule restricts the EEOC from altogether circumventing Title VII's "integrated, multistep enforcement procedure," *Shell Oil*, 466 U.S. at 62 (citation omitted), by including in a lawsuit matters that never were the subject of an investigation, reasonable cause determination, and conciliation. *See Delight Wholesale Co.*, 973 F.2d at 668-69; *EEOC v. Bailey Co.*, 563 F.2d 439, 446 (6th Cir. 1977); *EEOC v. Sterling Jewelers, Inc.*, 3 F. Supp. 3d 57, 64 (W.D.N.Y. 2014), *appeal filed*, No. 14-1782 (2d Cir. May 15, 2015); *EEOC v. Outback Steak House of Fla., Inc.*, 520 F. Supp. 2d 1250, 1264 (D. Colo. 2007); *EEOC v. Jillian's of Indianapolis, Ind., Inc.*, 279 F. Supp. 2d 974, 979-81 (S.D. Ind. 2003). As the Eighth Circuit itself observed:

> While "[t]he EEOC may seek relief on behalf of individuals beyond the charging parties and for alleged wrongdoing beyond those originally charged," it "must discover such individuals and wrongdoing *during the course of its investigation.*"

* * *

> "The relatedness of the initial charge, the EEOC's investigation and conciliation efforts, and the allegations in the complaint is necessary to provide the defendant-employer adequate notice of the charges against it and a genuine opportunity to resolve all charges through conciliation."

Pet. App. at 109a-110a (citations omitted).

It follows that dismissal of an EEOC lawsuit based on claims that were not subject to proper investigation justifies an award of attorney's fees under this Court's decision in *Christiansburg*. Indeed, the Fourth and Ninth Circuits have held that the EEOC's failure to satisfy its pre-suit administrative requirements can support a finding that the claim was "frivolous, unreasonable, or groundless" under *Christiansburg*, thus entitling a prevailing defendant to attorney's fees.

In *EEOC v. Propak Logistics, Inc.*, for instance, the Fourth Circuit affirmed an attorney's fee award to a prevailing defendant in a class action case brought by the EEOC, finding that "the EEOC acted unreasonably in filing the employment discrimination complaint, because events that occurred during the EEOC's administrative investigation precluded the EEOC from obtaining either injunctive or monetary judicial relief." 746 F.3d 145, 147 (4th Cir. 2014). In awarding attorney's fees to Propak, the lower court found that the EEOC's lawsuit "effectively was moot at its inception," *id.* at 152, in part because the agency had not identified a class of victims eligible for monetary relief during its investigation, yet nevertheless sued on their behalf. *Id.* In affirming the fee award, the Fourth Circuit observed that "the court's fee award reflected proper consideration of the

Christiansburg standard by assessing whether the EEOC acted unreasonably in initiating the litigation." *Id.* (footnote omitted).

Concurring, Judge Wilkinson wrote separately "to address an unfortunate implication in the [EEOC's] brief: *that federal agencies, and the [EEOC] in particular*, should be treated differently from private parties with regard to attorneys' fees determinations." *Id.* at 154. Recognizing that the *Christiansburg* standard is aimed to deter unjustified litigation, Judge Wilkinson stated that "it was not unreasonable for Congress to expect the Commission, with its store of expertise and experience, to recognize a baseless suit before being told the same by a federal court." *Id.* at 155. "For this reason, '[w]hen a court imposes fees on a plaintiff who has pressed a "frivolous" claim, it chills nothing that is worth encouraging.'" *Id.* (citation omitted).

Similarly, in EEOC v. Pierce Packing Co., the Ninth Circuit affirmed the lower court's grant of summary judgment and award of attorney's fees to the prevailing defendant, in part because "not once has the EEOC conducted its own statutorily mandated investigation nor has it made a reasonable cause determination." 669 F.2d 605, 608 (9th Cir. 1982) (citation omitted). It observed, "Genuine investigation, reasonable cause determination and conciliation are jurisdictional conditions precedent to suit which are conspicuously absent here." *Id.* In particular, as the district court found, "[t]hese procedural and regulatory defects committed by the EEOC were clearly cognizable at an early stage in this litigation's history. The EEOC's obvious disregard for such promulgated regulations is the apex of unreasonableness. There is adequate

support in the record to uphold this finding." *Id.* at 608-09 (citations omitted).

The Eighth Circuit's decision below limits civil rights fee awards to cases involving rulings "on the merits," which it has now determined excludes claims dismissed due to the EEOC's failure to meet its pre-suit duties. Pet. App. 23a-24a. Because the decision below is contrary to the principles established by this Court in *Christiansburg* and conflicts with decisions of the Fourth and Ninth Circuits on this issue, review by this Court is warranted.

B. Precluding A Prevailing Defendant From Recovering Attorney's Fees When A Claim Is Dismissed For The EEOC's Failure To Investigate Would Undermine Effective Title VII Enforcement By Removing A Powerful Disincentive Against Increasingly Abusive Litigation Tactics By The EEOC

1. The EEOC's recent enforcement efforts demonstrate both a focus on systemic litigation and a disturbing trend towards bringing suit without first satisfying all of its pre-suit obligations

Review of the decision below is especially warranted in light of the EEOC's current enforcement strategy that places particular emphasis on class-based systemic and pattern-or-practice discrimination litigation.[3] In its Strategic Enforcement Plan (SEP) for

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[3] According to the EEOC's Strategic Enforcement Plan for Fiscal Years 2013 – 2016, of particular interest to the EEOC are "issues that will have broad impact because of the number of individuals, employers or employment practices affected."

Fiscal Years 2013-2016, for instance, the EEOC has committed to progressively increasing the percentage of systemic cases on its active litigation docket each fiscal year.[4] In furtherance of that objective, the agency has established a specific, numerical target that it expects its enforcement staff to meet, largely ignoring objections from the business community that such an approach would encourage hasty, insufficient systemic charge investigations and detract from meaningful, pre-suit settlement efforts.[5] Although the EEOC's current SEP requires field offices to progressively increase the percentage of systemic cases on their active litigation dockets, it gives no indication that pre-suit charge resolution or meaningful investigation are agency priorities. Such policies incentivize staff to bypass investigation and pre-suit conciliation in favor of high-profile, class-based lawsuits.

To the extent that the EEOC has formalized enforcement tactics that are at odds with the purposes and objectives of Title VII, it is now more important than ever that the courts retain the discretion to

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EEOC, Strategic Enforcement Plan FY 2013-2016, *available at* http://www.eeoc.gov/eeoc/plan/sep.cfm (last visited June 18, 2015).

[4] EEOC, SEP FY 2013-2016, *available at* http://www.eeoc.gov/eeoc/plan/sep.cfm (last visited June 18, 2015).

[5] The agency has exceeded the SEP active systemic litigation targets in the last two fiscal years. *See* EEOC, Fiscal Year 2013 Performance and Accountability Report (Systemic Cases – Performance Measure 4), *available at* http://www.eeoc.gov/eeoc/plan/2013par.cfm (last visited June 18, 2015) and EEOC, Fiscal Year 2014 Performance and Accountability Report (Systemic Cases – Performance Measure 4), *available at* http://www.eeoc.gov/eeoc/plan/upload/2014par.pdf (last visited June 18, 2015).

sanction the agency for such litigation abuses. A particularly effective deterrent is the award of attorney's fees to a prevailing defendant where it is determined that the EEOC's failure to investigate results in the filing, and eventual dismissal, of a groundless lawsuit.

Moreover, as noted above, although the EEOC generally is permitted to pursue in litigation any statutory violation growing out of facts uncovered during a "reasonable investigation" of an underlying charge, the agency must actually investigate prior to suit in order to invoke that rule. *See Delight Wholesale Co.*, 973 F.2d at 668-69. Despite Title VII's mandate that the EEOC must investigate and conciliate prior to resorting to litigation, the agency in recent years has embarked on a disturbing pattern of "naming everyone and asking questions later." Pet. App. 190a. *See also Propak Logistics, Inc.*, 746 F.3d at 152 (dismissing lawsuit because EEOC had not identified a specific class of victims during its investigation); *Sterling Jewelers*, 3 F. Supp. 3d at 69 (dismissing EEOC's nationwide pattern-or-practice employment discrimination claim for failure to meet pre-suit investigation requirements); *EEOC v. Bloomberg L.P.*, 967 F. Supp.2d 802, 812-16 (S.D.N.Y. 2013) (recognizing "where, as here, the EEOC completely abdicates its role in the administrative process, the appropriate remedy is to bar the EEOC from seeking relief . . . and dismiss the EEOC's Complaint[,]" and granting summary judgment on EEOC's claims for individual relief because pre-suit investigation was class-wide only); *Jillian's*, 279 F. Supp.2d at 980 (granting summary judgment in favor of employer on nationwide class allegations because "[t]he EEOC's investigation of the four charges was conducted entirely with

respect to Jillian's Indianapolis. Its Amended Complaint, alleging a nationwide class, has insufficient basis in its actual investigation").

The EEOC's rush to litigate claims that it never examined at the charge investigation stage, or failed to attempt to resolve through conciliation, confirms *amici's* growing concern that the agency effectively has abandoned its commitment to pursue meaningful administrative charge resolution, choosing instead the more expedient, high-profile litigation route. Indeed, *amici* are extremely troubled by the EEOC's recent efforts to expand its own authority under Title VII, while at the same time working to sharply curtail the role of the courts in policing its enforcement activities. *See, e.g.*, *Mach Mining, LLC v. EEOC*, 135 S. Ct. 1645 (2015) (where the EEOC argued, unsuccessfully, that its pre-suit conciliation efforts are not subject to judicial review); *Propak Logistics, Inc.*, 746 F.3d at 150 (where the EEOC argued, again unsuccessfully, that the doctrine of laches can never be applied when the government is the plaintiff).

2. Facilitating the award of attorney's fees to prevailing defendants based on frivolous, unreasonable, or groundless EEOC lawsuits stemming from a failure to investigate would discourage the agency from pursuing ill-conceived litigation

Allowing the decision below to stand would invite the EEOC to ignore its statutorily-mandated pre-suit requirements without any meaningful consequence. As this Court observed in *Mach Mining*, "[w]e need only know – and know that Congress knows – that *legal lapses and violations occur, and especially so*

when they have no consequence." *Mach Mining*, 135 S. Ct. at 1652-53 (emphasis added).

The EEOC statutorily is required to satisfy all of its administrative pre-suit requirements prior to filing a lawsuit. Indeed, as the Eighth Circuit itself acknowledged, "[t]he EEOC's ability to bring suit and the administrative process are '*sequential steps in a unified scheme* for securing compliance with Title VII.'" Pet. App. 19a (citation omitted). This case highlights the importance of putting into place meaningful sanctions to prevent these types of abuses, and thereby encourage compliance with the "integrated, multistep enforcement procedure," *Shell Oil*, 466 U.S. at 62, mandated by Congress.

Awarding attorney's fees to prevailing defendants in such cases also provides a check on the extra-congressional efforts by the EEOC to expand its own enforcement authority. *See Propak Logistics, Inc.*, 746 F.3d at 156 (Wilkinson, J., concurring) (recognizing that "[t]here is a danger that those inside a public bureaucracy, armed with significant resources, authority, and discretion, may become gradually numb as to how their actions affect those outside parties they investigate or sue"); *see also City of Arlington, Tex. v. FCC*, 133 S. Ct. 1863, 1878-79 (2013) (Roberts, C.J., dissenting) (expressing concern regarding "the danger posed by the growing power of the administrative state ...," and describing "[t]he collection of agencies housed outside the traditional executive departments ... as the 'headless fourth branch of government,' reflecting not only the scope of their authority but their practical independence") (citation omitted).

Title VII actions often are complex, time-consuming, and very costly to defend. This is especially true of the substantial number of Title VII cases brought against small to mid-sized employers whose litigation resources often pale in comparison to those of the federal government. *See Christiansburg*, 434 U.S. at 423 n.20 (noting that "many defendants in Title VII claims are small- and moderate-size employers for whom the expense of defending even a frivolous claim may become a strong disincentive to the exercise of their legal rights"). The rule created by the court below, if allowed to stand, essentially would provide the EEOC with a "get out of jail free card" — leaving a prevailing defendant on the hook for substantial attorney's fees and costs for claims that never should have been brought in the first place. *See, e.g.*, Pet. App. 84a (awarding CRST $4,189,296.10 in attorneys' fees, $91,758.46 in costs, and $413,387.58 in out-of-pocket expenses); *EEOC v. Peoplemark, Inc.*, 732 F.3d 584, 587, 591-92 (6th Cir. 2013) (affirming lower court's order that EEOC reimburse employer nearly $800,000 in attorney's fees and costs in having to defend against Title VII lawsuit that EEOC continued to pursue even after it should have known it had no merit); *EEOC. v. TriCore Reference Labs.*, 493 F. App'x 955, 960-61 (10th Cir. 2012) (upholding award of over $140,000 in attorney's fees and costs because the EEOC knew or had reason to know that its lawsuit was "frivolous, unreasonable, and without foundation").

CONCLUSION

Accordingly, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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